TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 133.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 22, 1906.

(21,123.)

(21,123.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 133.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 27, 1909.

1 In the Court of Claims.

No. 29875.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY
vs.
THE UNITED STATES.

I. *Petition and Amended Petition.*

The claimant filed its original petition on the 15th November, 1906.

On the 31st July, 1907, by leave of court in lieu of said original petition it filed its amended petition, which is as follows:

2 *Amended Petition.*

Filed July 31, 1907.

To the Chief Justice and Judges of the Court of Claims:

The amended petition of the Chicago, St. Paul, Minneapolis & Omaha Railway Company respectfully represents:

I.

The petitioner is a citizen of the United States, being a body corporate duly incorporated under the laws of the State of Wisconsin, and now owns, and for a long time has owned, among other properites a line of railroad from St. Paul in the State of Minnesota to Le Mars in the State of Iowa.

II.

Congress by Act of March 3, 1857, (11 Stat. L. 195), and May 12, 1864, (13 Stat. L. 72), granted to the States of Minnesota and Iowa, respectively, certain lands from the public domain lying along the route therein specified, for the purpose of aiding in the construction of a railroad between St. Paul, in the State of
3 Minnesota and Sioux City, in the State of Iowa, and provided that the United States mails should be transported on said railroad, under the direction of the Postmaster General at such rates as Congress might by law direct, and your petitioner's said railroad between St. Paul and a point six and a quarter miles north of Le Mars, in the State of Iowa is constructed upon the route specified by said Acts of Congress, and your petitioner received in aid of its construction the land granted thereby. That portion of your petitioner's said road between Le Mars and a point six and a quarter miles north thereof was constructed without any aid from the United

States by grant of land or otherwise. (6 Land Dec. pp. 47-51. Sioux City & St. P. R. R. Co. vs. U. S., 159 U. S. pp. 349-62.)

III.

Since about May 1, 1882, the Minneapolis Union Railway Company has owned a railroad between Minneapolis and University Switch in the State of Minnesota, where it forms a junction with the road of the Great Northern Railway Company and by lease contract with the said Great Northern Railway Company forms a portion of said latter company's route between Minneapolis and St. Paul. This road belonging to the Minneapolis Union Railway Company was constructed without any aid from the United States by grant of land or otherwise. (Great Northern vs. U. S., No. 27,767 in the Court of Claims.)

4 IV.

From a time prior to August 7, 1880, the St. Paul, Minneapolis & Manitoba Railway Company and its successors in title, the Great Northern Railway Company, have owned among other properties a railroad between St. Paul, Minneapolis and Breckinridge, which was built upon the route and upon the terms provided by Act of Congress approved March 3, 1857, (11 Stat. L. 195), granting to the State of Minnesota certain lands from the public domain lying along its route.

From a time prior to July 6, 1887, the Iowa Falls and Sioux City Railroad Company, and its successors in title, the Illinois Central Railroad Company, have owned, among other properties, a railroad between Dubuque and Sioux City, in the State of Iowa, which was built upon the route and upon the terms provided by Act of Congress approved May 15, 1856, (11 Stat. L. 9), granting to the State of Iowa lands from the public domain lying along its route. Both of said granting acts provided that the United States mails should be transported on said railroad under the direction of the Postmaster General at such rates as Congress might by law direct.

Your petitioner had no part in the construction of either the said road belonging to the Great Northern Company, or the road belonging to the Illinois Central Company as hereinbefore described, and did not become entitled to or receive any benefit thereby from the United States under the terms of the several acts, or in any other way; but such benefits as thereby accrued were received alone by the respective companies which constructed and own said
5 railroads. Ever since the construction of said roads the respective companies owning them have operated trains and transported the United States mails upon them, they being classed by the Postmaster General as Postal Route No. 141,004 and 143,021, respectively.

V.

About August 7, 1880, your petitioner entered into a contract in writing with the St. Paul, Minneapolis & Manitoba Company, pro-

viding for the operation of its trains over the said tracks of the Manitoba Company between St. Paul and Minneapolis, at a rental price therein specified. At this time the Manitoba Company had in contemplation the construction of the road of the Minneapolis Union Company between Minneapolis and University Switch as set out in Paragraph III hereof, and its said contract with petitioner provided that when said construction was completed, petitioner should have the use of said road for its trains between Minneapolis and University Switch.

From about August 7, 1880, to about May 1, 1882, petitioner operated its trains between Minneapolis and St. Paul over the said land-aided tracks of the Manitoba Company. Since May 1, 1882, petitioner has operated its trains between Minneapolis and St. Paul over the said unaided tracks of the Minneapolis Union between Minneapolis and University Switch, 2.18 miles and over the said aided tracks of the Manitoba Company and its successors in title, the Great Northern Company, between University Switch and St. Paul, 8.26 miles.

6 About July 6, 1887, petitioner entered into a contract in writing with the Iowa Falls & Sioux City Railroad Company, providing for the operation of its trains over the Sioux City Company's tracks between Le Mars and Sioux City at a rental price therein specified, and ever since that time petitioner has operated its trains over said tracks belonging to the said Sioux City Company and its successors in title, the Illinois Central Railroad Company.

Under said contracts your petitioner has during the periods hereinbefore stated used and is now using the road-bed and appurtenances only of the Minneapolis Union between Minneapolis and University Switch and the Great Northern between University Switch and St. Paul and the Illinois Central between Le Mars and Sioux City. But under the terms of its said contracts it has not been permitted to do any local business on its own account on said tracks nor has it had any ownership in or control over them, nor has it used or had the right to use any of the rolling stock or other equipment of either of said companies.

VI.

Ever since the date of its several contracts hereinbefore referred to, your petitioner has operated its mail trains, made up of its own rolling stock and controlled by its own servants, between Minneapolis and Sioux City, using to make its continuous route between said points the various tracks hereinbefore described. About August 7, 1880, the Postmaster General established a postal route for

7 petitioner between Minneapolis and Le Mars, and about July 6, 1887, the date of petitioner's contract with the Sioux City Company, he extended said route to Sioux City, the said route being now numbered 141,025, and by official orders from time to time, he has maintained said postal route ever since. During the whole of said period, your petitioner has transported the mails over said postal route, using, from August 7, 1880, to May 1, 1882, the

aided tracks of the Manitoba Company, now Great Northern, between Minneapolis and St. Paul, and since May 1, 1882, using the unaided tracks of the Minneapolis Union between Minneapolis and University Switch, and the unaided tracks of the Manitoba, now Great Northern Company, between University Switch and St. Paul, its own aided tracks between St. Paul and a point six and a quarter miles north of Le Mars, its own unaided tracks between this latter point and Le Mars and the tracks of the Sioux City, now Illinois Central Company, between Le Mars and Sioux City, but during the whole of said period, the Postmaster General has allowed and paid your petitioner only eighty per centum of the pay allowed by law to unaided companies for its entire service upon said postal route.

VII.

Your petitioner concedes that the allowance and payment of the said eighty per centum for its services upon that portion of said Postal Route No. 141,025, which was performed on your petitioner's tracks between St. Paul and a point six and one-half miles
8 north of Le Mars, was and is a full allowance for said service, but it alleges that no deduction should have been made from its pay for said service upon that portion performed on its tracks between Le Mars and a point six and one-half miles north thereof and for said service upon the tracks of the Minneapolis Union between Minneapolis and University Switch, for the reason that neither of said tracks were built with aid from the United States. And it alleges further that no deduction should have been made from its pay for said service upon the Great Northern Company's tracks, first between Minneapolis and St. Paul, and afterwards between University Switch and St. Paul, or from its pay for said service upon the Illinois Central tracks between Le Mars and Sioux City, for the reason that whatever aid has been extended to those companies in the construction of their respective tracks has been received by them respectively, and no aid or benefit of any character has ever come from the United States to your petitioner by reason of the construction of said tracks.

And petitioner further alleges that in making said deductions the Postmaster General has withheld from its lawful pay for its said service upon said Postal Route No. 141,025 the sum of forty thousand dollars, which should have been paid to it according to the rate fixed by law and the weight of the mails ascertained by the Postmaster General.

9 Wherefore, the premises considered, your petitioner prays judgment against the United States for the sum of $40,000 together with its cost in this behalf incurred.

(Signed) CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO.,
By SAM'L A. PUTMAN, *Attorney in Fact.*

SAM'L A. PUTMAN,
Attorney for Claimant.

10 DISTRICT OF COLUMBIA, *ss:*

Samuel A. Putman, being duly sworn says that he is the Attorney in Fact of the Chicago, St. Paul, Minneapolis & Omaha Railway Company; that he has read the foregoing amended petition and knows the contents thereof; that the averments thereof he verily believes to be true; that there is justly due from the United States to the petitioner therein the sum in said petition, after allowing all just credits and offsets, and no assignment or transfer of said claim or any part thereof or interest therein has been made.

SAM'L A. PUTMAN.

Sworn to and subscribed before me this 27 day of July, 1907.

[SEAL.] M. S. W. DAY,
Notary Public.

11 II. *Traverse. Filed March* 24, 1908.

In the Court of Claims of the United States, —— Term, A. D. 1907.

No. 29875.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

Filed March 24, 1908.

III. *Argument and Submission.*

On the 24th day of March, 1908, this cause coming on to be heard,

Mr. Samuel A. Putman made the argument for the claimant and Mr. Philip M. Ashford replied for the defendants, and the case was submitted.

12 IV. *Findings of Fact and Conclusion of Law.*

No. 29875.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY
vs.
THE UNITED STATES.

This case having been heard by the Court of Caims, the court upon the evidence, makes the following

Findings of Fact.

I.

The claimant is a citizen of the United States, being a body corporate duly incorporated under the laws of the State of Wisconsin, and now owns, and from a time prior to October 1, 1900 has owned, among other properties, a line of railroad from St. Paul in the State of Minnesota to Le Mars in the State of Iowa.

II.

From a time prior to October 1, 1900 the Minneapolis Union Railway Company has owned railroad tracks between the Union Passenger Station in the City of Minneapolis and University Switch, 2.18 miles in length, which were built without any aid from the United States by grant of land or otherwise.

During the same period the Great Northern Railway Company has owned railroad tracks between University Switch and St. Paul in the State of Minnesota, 8.26 miles in length, which were built with the aid from the United States of grants of lands provided by act of Congress approved March 3, 1857. (11 Stats. L., 195).

During the same period claimant has owned railroad tracks between St. Paul and a point six and a quarter miles north of Le Mars in the State of Iowa, 237.81 miles in length, which were built with the aid from the United States provided by acts of Congress approved March 3, 1857 (11 Stats. L., 195) and May 12, 1864 (13 Stats. L., 72), and has owned railroad tracks between said last named point and Le Mars, 6.25 miles in length, which were built without any aid from the United States by grant of land or otherwise.

13

During the same period the Illinois Central Railroad Company has owned railroad tracks between Le Mars and Sioux City in the State of Iowa, 25.1 miles in length, which were built with the aid from the United States provided by the act of Congress approved May 15, 1856 (11 Stats. L., 9).

During said period claimant used the said tracks to form a continuous route for the operation of its mail trains, made up of its own rolling stock and controlled and operated by its own servants, between Minneapolis and Sioux City, except that within the last named city, it did not use the station of the Illinois Central Company, but had a station of its own.

III.

During said period claimant operated its trains over the said tracks of the Great Northern Company under a contract in writing with the St. Paul, Minneapolis and Manitoba Railway Company, the predecessor in title to said tracks, the material provisions of which are as follows:

"This agreement, made and entered into this 7th day of August, 1880, by and between the St. Paul, Minneapolis and Manitoba Rail-

way Company, a corporation organized and existing under the laws of the State of Minnesota, party of the first part, and the Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, party of the second part, witnesseth:

* * * * * * *

"That the second party, its successors and assigns, shall have, possess and enjoy during the continuance of this contract the right and privilege to run, subject to reasonable time cards, rules and regulations to be made from time to time as hereinafter set forth, such of its locomotives, engines, cars and trains, handled by its own employés, as shall be reasonably necessary for the efficient and full transaction of its business to and from the city of Minneapolis, Minnesota, and all points on second party's road, east of St. Paul, over the *main track* of the first party as now constructed.

* * * * * * *

"In consideration of the premises the second party, its successors and assigns, hereby agrees to and with the first party, its successors and assigns, as follows: to wit:

"That from and after the taking effect of this contract, as hereinafter provided, the second party, its successors and assigns, will use the property here*be*fore specified according to and under this contract, and will pay to the first party, its successors and assigns, on the tenth day of each and every month during its continuance at the first party's office in the City of St. Paul, the rental due them for the then last proceding month, whether they have used the
14 same or not; unless they shall have been prevented from using the same by some act or fault of the first party.

"That during all the time of the existence of this contract, the second party, its successors and assigns, and its and their officers and employés, while on the property of the first part-, shall and will faithfully obey all the rules and regulations which shall be made from time to time as hereinafter provided.

"That the amount of *monthly* rental which shall become due from the second party, its successors or assigns, to the first party, its successors or assigns, shall be a sum of money equal to one-twelfth part of the annual interest at the rate of six and one-half per cent per annum, on one-half of the value of the property of the first party, which the second party is entitled to use under this contract.

* * * * * * *

"The second party further agrees that, in addition to the rental heretofore agreed to be paid to the first party for the use of property under this contract, it will pay to the first party at its office in the City of St. Paul, on the tenth day of each month during the continuance of this contract, such proportion of the cost or expense of repairing and maintaining the property covered by this contract during the then last preceding calendar month as the number of wheels per mile it shall run over the said property or any part thereof bears to the whole number of wheels per mile run over the same during the same period of time.

* * * * * * *

"All local business between St. Paul and Minneapolis, and all intermediate points, and all earnings upon such business done by the party of the second part over said railway shall belong exclusively to the party of the first part, and shall be accounted for and paid over to the party of the first part at the then existing tariff rates of the party of the first part for such business. It being, however, expressly understood and agreed that nothing herein contained shall be so construc*t*ed as to render it obligatory upon the party of the second part to do any such business.

* * * * * * *

"And it is further mutually agreed that this contract and the rights herein granted and agreed upon, and all obligations herein expressed upon, either party shall continue for the period of twenty-five years from the taking effect hereof, as hereinafter provided, and thereafter until the expiration of one year from the date upon which either party shall give notice in writing to the other of an intention or desire to terminate the same, unless sooner terminated by the mutual agreement of the parties hereto, and that this agreement and all the agreement- herein contained, made by either party, shall be binding upon its successors and assigns."

* * * * * * *

IV.

During said period claimant operated its trains over the said tracks of the Illinois Central Company under a contract in writing with the Iowa Falls and Sioux City Railroad Company, the predecessors in title to said tracks of the Illinois Central Company, the material provisions of which are as follows:

15 "Articles of Agreement, Made this 6th day of July, A. D., 1887, by and between the Iowa Falls and Sioux City Railroad Company, a corporation of the State of Iowa, party of the first part, and the Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation of the State of Wisconsin, party of the second part, witnesseth:

"Said party of the first part, for and in consideration of the rental hereinafter reserved, and the covenants and agreements hereinafter contained, on the part of the party of the second part to be performed, does hereby grant to said second party the right to run its engines and cars upon and over that section of the railroad of the party of the first part lying between the place, in the town of Le Mars, in said Iowa, where the track of the railroad of the party of the second part connects with the railroad of the party of the first part, and the point of connection of the tracks of said party of the first part with the tracks of said party of the second part, at the south line of Ninth Street in Sioux City, a distance of about 24 miles; the right hereby granted is the right to use the tracks and other facilities hereinafter specified of the said party of the first part with the said party of the *first* part, and such other railway companies as may be permitted by the said party of the firts part to use said track, and includes the right to the use of the main track of the party of

the first part between the points named, and the use of all side tracks, water stations, passenger and freight houses, and all conveniences and appliances provided for using and operating the railroad of the said party of the first part between Le Mars and Sioux City, but does not include the stations of the said party of the first part at either of said last named points.

"This agreement shall take effect on the first day of October, A. D., 1887, and continue during the corporate existence of the parties hereto, and any extensions or renewals of their charters.

* * * * * * *

"That said party of the second part shall have the right to carry local passengers or freight between the stations of Le Mars and Sioux City, or intermediate stations, as well as the right to carry freight, passengers, mail and express goods, between any points on its line north of Le Mars, and Le Mars, Sioux City or any intermediate station or stations on the railroad above described, but it is expressly understood and agreed that the rates established by said party of the second part for local passengers and freight between Le Mars and Sioux City, and intermediate stations shall not be less than the rates of the party of the first part between Sioux City and Le Mars and such intermediate stations; and that the said party of the second part shall pay to the party of the first part sixty per cent of the gross receipts of all such local business, whether passenger or freight, carried by it between Le Mars and Sioux City aforesaid; or to, from or between any of the said intermediate stations.

"In consideration of the right hereby granted, and the several covenants and agreements herein contained on the part of the party of the first part to be performed, the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of $450 per mile for the use of each mile of main track embraced in this agreement for each and every year during the continuance thereof, payments from the 1st day of October, A. D., 1887, to be made in regular monthly installments of $900.00 each, payable on or before the 15th day of each month.

16 "The parties hereto shall agree upon and appoint a person who shall, under the orders of the proper officer of said party of the first part, have the care of the premises referred to in this agreement, for the purpose of maintaining, repairing and keeping the same in good running order, making all ordinary repairs and renewals. The cost of such maintenance, renewals and repairs shall be paid by the parties hereto monthly, in proportion to the car mileage of each per month, estimating a locomotive as equal to three cars. All extraordinary repairs, such as renewals, sidings, and similar expenditures, shall be made and provided only by agreement of both the parties hereto, unless the party of the first part elects to make them at its own cost."

* * * * * * *

V.

Claimant had no part in the construction of said tracks belonging to the Great Northern Company or of said tracks belonging to the Illinois Central Company, and did not receive any benefit on account of their construction by grant of land or otherwise from the United States. Ever since the construction of said tracks the respective companies owning them have operated trains and transported the United States mails over them, and the use of said tracks by the owners does not appear to have been limited by the claimant's use of them.

Said tracks belonging to the Great Northern Company between University Switch and St. Paul are a portion of Postal Route No. 141,004 between St. Paul and Fargo, North Dakota. Said tracks belonging to the Illinois Central Company between Le Mars and Sioux City are a portion of Postal Route No. 143,021 between Dubuque and Sioux City in the State of Iowa.

VI.

Prior to October 1, 1900 the Postmaster General designated the continuous line of railroads between Minneapolis and Sioux City hereinbefore described as a postal route upon which claimants should transport the United States mails, numbering said route 141,025, and by official orders from time to time he has maintained said postal route ever since. During the period from October 1, 1900 to September 30, 1906, both inclusive, claimant carried the mails over said route, but during the whole of said period, the Postmaster General allowed and paid it for the whole of said
17 route only eighty per centum of the compensation fixed by law to be allowed and paid for similar service to railroad companies whose railroad was not constructed in whole or in part by grant of land, and the same has been paid quarterly after the service was performed.

VII.

During the period from October 1, 1900 to September 30, 1906 both inclusive, deductions of twenty per cent from the full compensation aforesaid for each of the following portions of said postal route No. 141,025 were as follows, no part of which has been paid to claimant:

1. Between Minneapolis and University Switch, 2.18 miles, non land grant	$876.53
2. Between University Switch and St. Paul, 8.26 miles, land grant	3,321.18
3. Between Le Mars and a point 6¼ miles north thereof, non land grant	2,513.00
4. Between Le Mars and Sioux City, 25.1 miles, land grant	10,092.20
Making a total of	$16,802.91

For the period from November 15, 1900, a date six years prior to the filing of the petition herein, to September 30, 1906, the deductions of twenty per cent from the full compensation aforesaid for each as said portions of said postal route No. 141,025 were as follows:

5. Between Minneapolis and University Switch, non land grant	$860.64
6. Between University Switch and St. Paul, land grant	3,260.96
7. Between Le Mars and a point 6¼ miles north thereof, non land grant	2,467.43
8. Between Le Mars and Sioux City, land grant	9,909.23
Making a total of	$16,498.26

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover judgment from the United States for the deductions made on the portions of said line which were not land aided, namely on items 1 and 3, in finding VII, the sum of three thousand three hundred and eighty-nine dollars and fifty-three cents ($3,389.53).

18

The petition as to the deductions made on portions of said line which were built with the aid of land grants from the United States is dismissed on the authority of the Astoria and Columbia River Railroad Company (41 Ct. Cls., 284).

BY THE COURT.

Filed April 6, 1908.

19

V. *Judgment of the Court.*

No. 29875.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY
vs.
THE UNITED STATES.

At a Court of Claims held in the city of Washington on the 6th day of April, 1908, judgment was ordered to be entered as follows:

The court on due consideration of the premises, find in favor of the claimant, and do order, adjudge and decree that the said Chicago, St. Paul, Minneapolis and Omaha Railway Company do have and recover of and from the United States the sum of three thousand three hundred and eighty-nine dollars and fifty-three cents ($3,389.53).

And the petition of the claimant as to "deductions made on portions of said line which were built with the aid of land grants from the United States is dismissed on the authority of the Astoria and Columbia River Railroad Company (41 Court of Claims Reports page 284)."

BY THE COURT.

20 VI. *Application for and Allowance of Appeal.*

Comes the claimant by its attorney Samuel A. Putman, and moves the court to grant it an appeal to the Supreme Court of the United States from the judgment herein entered against the claimant, The Chicago, St. Paul, Minneapolis and Omaha Railway Company, on the 6th day of April, 1908.

SAMUEL A. PUTMAN,
Attorney for the Claimant.

Filed in open court April 13, 1908.

Ordered that this appeal be allowed as prayed for.

BY THE COURT.

April 13, 1908.

21 No. 29875.

THE CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY
vs.
THE UNITED STATES.

I John Randolph Assistant Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the judgment of the court, of the application of the claimant for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 18″ day of April, A. D. 1908.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 21,123. Court of Claims. Term No. 133. The Chicago, St. Paul, Minneapolis & Omaha Railway Company, appellant, vs. The United States. Filed April 18th, 1908. File No. 21,123.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 133.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

In this case the Government seeks to justify land-grant deductions from the mail pay of a non-land-aided railroad company, because it runs its trains carrying the mail over tracks belonging to a land-aided company. The case involves two pieces of railroad, but it is sufficient to state the facts as to the road belonging to the Great Northern, which is its line between St. Paul and University Switch in Minneapolis. This is part of the line built by the grantee of the State of Minnesota and was aided by the land grant made by the act of March 3, 1857 (11 Stat., 195). Section 5 of this act reads:

> "*And be it further enacted*, That the United States mail shall be transported over said roads and branches, under the direction of the Post-Office Department, at such price as Congress may by law

> direct: *Provided,* That until such price is fixed by law the Postmaster-General shall have the power to determine the same."

Congress fixed the price by the act of July 12, 1876 (19 Stat., 78), reading thus:

> "SEC. 13. That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act."

The condition of earning the land grant was the building of a single track, but the Great Northern or its grantors have provided several. Whilst in possession of the railroad, running its own trains, and carrying all the freight, passengers and mail offered for transportation, the Great Northern has a surplus of track capacity and by contract permits the Omaha and other companies to run their trains over its tracks. The Omaha Company carries the mail from Minneapolis to Sioux City and for some eight miles runs on the Great Northern tracks. For this part of the run the Government asserts the right based on the act of Congress of July 12, 1876, to deduct twenty per cent from the moneys otherwise due, because of the land grant to the Great Northern Company's grantor.

The Great Northern Company is under no obligation to carry the mail to Sioux City. Its obligation to the Government was performed in full by its building the road and running over the same for the Government's use its own trains. Had the Omaha Company built its own line between Minneapolis and St. Paul the Government officers would have asserted no right to deduct from its mail pay. Its right to run trains over the Great Northern is for its purposes equivalent to building its own road and the Great Northern is no less useful or efficient for permitting the

Omaha Company to use its rails. Therefore the Government is not prejudiced by the Omaha Company running over the Great Northern instead of providing itself with its own rails, and there is no reason resting in justice or equity for the right to deduct here asserted.

Turning to the act of 1876 it will be found that there is no more foundation in the language of the law for the right to deduct. The act specifies "The railroad companies whose railroad was constructed" by land-grant aid as those which are to allow the deduction; and the Omaha Company's line was not so aided.

We do not contend that a land-aided road can be sold or leased, either in whole or in part, so as to avoid its obligation to the Government. To this extent we concede that the obligation runs with the railroad aided by a land grant. But the act does not say that companies permitted simply to run trains on the road shall suffer deductions. They receive no aid from the grant and are neither within the terms or the reason of the statute.

The learned Court of Claims decided this case under the misapprehension that the Omaha Company was a lessee of the railroad. Were that true we should not contend against the court's conclusion. But this court in *Union Pacific Railway Company v. Chicago, Rock Island and Pacific Ry. Co.*, 163 U. S., 564, decided that such contracts giving running rights were not leases. See pp. 582-3. Moreover the court there drew the distinction sharply between such contracts and leases; leases without express legislative sanction being *ultra vires* and void—*Thomas v. Railroad Company*, 101 U. S., 71; *St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S., 393; while trackage contracts like the one in question are *presumptively* valid and within the *implied* powers of a railway company—163 U. S., 585.

If within the implied powers of a railway company it must have been known by Congress when the act of 1876 was passed that such running rights frequently had been granted and must have been in contemplation that they

frequently would be granted thereafter. If Congress contemplated such rights, its failure to name the grantees of them as among those whose mail pay was to be cut is conclusive that they were not intended.

The brief of Mr. Putman refers to the Circuit Court decision sustaining our contention and it is unnecessary to comment on the decision in this brief. *United States v. Astoria & Columbia River Railroad Company*, 131 Fed. Rep., 1006.

CHARLES W. BUNN.

Office Supreme Court, U. S.
FILED.
JAN 31 1910
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1909.

THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY
vs.
THE UNITED STATES
No. 133.

BRIEF FOR APPELLANT.

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In the Supreme Court of the United States

OCTOBER TERM, 1909.

THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY
vs.
THE UNITED STATES
} No. 133.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from a judgment of the Court of Claims allowing in part and denying in part appellant's claim in the court below.

The claim is for deductions unlawfully made from appellant's pay for carrying the mails of the United States on its trains between Minneapolis, Minnesota, and Sioux City, Iowa, the Postal Route being designated by the Post Office Department as Route No. 141,025.

Appellant operates its mail trains between Minneapolis and Sioux City in part over tracks upon which it has mere trackage rights and in part over its own road. The Postal Route beginning at Minneapolis passes over the tracks of the Minneapolis Union Railway Company to University Switch, 2.18 miles; thence over the tracks of the Great Northern Railway Company to St. Paul, 8.26 miles; thence over its own tracks to a point six and a quarter miles north of Lemars in the State of Iowa, 237.81 miles; thence over its own tracks to

Lemars, 6.25 miles; thence over the tracks of the Illinois Central Railroad Company to Sioux City, 25.1 miles.

This Postal Route was designated and determined not by appellant but by the Post Office Department, and ever since it was so designated, that Department has deducted 20 per cent from appellant's pay over the entire route upon the ground that the railroad was land-aided and the pay subject to this deduction under the provisions of the act of July 12, 1876 (19 Stat. L., 78). By authority of the case of Alabama Great Southern vs. The United States (142 U. S., 615), it is presumed that the deductions for two of the sections of the route as above stated, will be conceded in this court as it was in the court below to be wrongful. The tracks of the Minneapolis Union Railroad Company between Minneapolis and University Switch were built without any aid of any character from the United States. The track beginning at a point six and a quarter miles north of Lemars and extending into Lemars was also built without aid of any character from the United States (Sioux City and St. Paul Railroad Company *vs.* The United States, 159 U. S., 349) and under authority of the Alabama Great Southern case, *supra*, and many cases following it in the Court of Claims, the court below rendered judgment in favor of the appellant for the deductions which had been made within six years before the filing of the petition for the mileage represented by those portions of the said Postal Route.

Appellant concedes that its own tracks between St. Paul and the point six and a quarter miles north of Lemars are land-aided and subject to the deduction which has been made by the Post Office Department, and appellant did not seek in the court below to recover anything on account of deductions made for this portion of the route.

This leaves two portions of the said Postal Route, the subject of this controversy; that is, the mileage between Univer-

sity Switch and St. Paul, and that between Lemars and Sioux City. The tracks in the first of these cases belong to the Great Northern Railway Company, and in the second to the Illinois Central Railroad Company. Each of these latter companies, or their predecessors in title, received aid from the United States by grant of land in the construction of the tracks in question owned by them, and each of them operates over its own tracks its own full train service upon which all the mails of the United States are or may be carried. In the case of the Great Northern the tracks in question are a portion of Mail Route No. 141,004, being the route between St. Paul and Fargo, and in the case of the Illinois Central, the tracks in question are a portion of Mail Route No. 143,021, being the route between Dubuque and Sioux City, Iowa. In neither case, as shown by the Findings of Fact, is the appellant the owner of the road, nor has it any control over or right in the road, except the right to operate its trains over it. It has contracts which allow it, in consideration of the payment of certain rentals, set out in detail in the Findings of Fact, to operate its trains over these tracks as a part of its Minneapolis-Sioux City route, but forbid it to do any local business on its own account upon them; that is to say, the appellant may not, under the terms of these contracts, do anything which interferes with the full use of them by the Great Northern in the one case and the Illinois Central in the other, these companies reserving to themselves the control of their respective roads and the business originating upon them.

The court below allowed appellant's claim for the deductions represented by the mileage between Minneapolis and University Switch and between a point six and a quarter miles north of Lemars and Lemars and rendered judgment therefor, but it denied appellant's claim for the deductions represented by the mileage over the Great Northern and the Illinois Central tracks and from its judgment denying a recovering of these latter deductions, this appeal is taken.

Assignment of Error.

1. The court below erred in holding that appellant is a railroad company "whose railroad was constructed in whole or in part by a grant of land," when the railroads in question were constructed by and are owned and operated by other companies who have let to appellant mere trackage rights upon them.

2. The court below erred in not rendering judgment in favor of appellant and against the United States for the full amount found by it (Finding 7) to have been deducted during the period from November 15, 1900, to September 30, 1906.

Legislation Defining Duties of Land-Grant Companies.

It may be well here to restate the legislation which the Post Office Department has supposed gave it authority to make the deductions of 20 per cent in this case so far as it pertains to the tracks of the Great Northern and Illinois Central Companies.

The aid given by the United States in building the said roads of the Great Northern and the Illinois Central, involved in this case, was respectively by acts of May 15, 1856 (11 Stat. L., 9), and March 3, 1857 (11 Stat. L., 195), and the 5th section of each of these latter acts is as follows:

> "That the United States mail shall be transported over such road, under the direction of the Post Office Department, at such price as Congress may by law direct; Provided, that until such price is fixed by law the Postmaster-General shall have the power to determine the same."

The Act of July 12, 1876 (19 Stat. L., 78), provides the compensation to be paid all companies for carrying the mails by rail, and its 13th section is as follows:

> "Sec. 13. That railroad companies, whose railroad was constructed in whole or in part by a grant of land made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act."

The grants in aid of the construction of the roads of the Great Northern and Illinois Central, in controversy in this case, were made respectively to the Territory of Minnesota and the State of Iowa. These latter governments passed them to railroad companies formed for the purpose of constructing the roads, and by various transfers these roads, together with all the rights and franchises of the companies to whom the said Territory and State had passed the grant, came into the ownership of the Great Northern in the one case and the Illinois Central in the other. It may be conceded that the acceptance by these companies of the grants of land completed contracts between them and the United States, which are fully expressed in the said 5th section of their respective granting acts and the said 13th section of the Act of 1876, quoted above, and it may be conceded that by these contracts privity was established between the United States and these various railroad companies. But appellant has not succeeded to the title or any part of the title of these respective roads, nor has it in any way directly or indirectly received any benefit from the respective grants or done any other thing which creates privity of contract between it and the United States or which makes it, in the language of the 13th section of the Act of 1876, a railroad company "whose railroad was constructed in whole or in part by a grant of land, etc."

THE OPINION OF THE COURT OF CLAIMS.

The court below does not seem to understand this distinction. It delivered no opinion in this case but decided it upon authority of the case of Columbia River and Astoria Railroad Company (41 C. C., 284). The Astoria Company had built a road without government aid from Astoria to a junction with the Northern Pacific, where it crosses the Columbia River at a place called Goble, some forty miles north of Portland. I had made its surveys to parallel the tracks of the Northern Pacific into Portland, but coming to a trackage agreement with the Northern Pacific, it abandoned its extension and operated its Astoria-Portland trains over the tracks of the Northern Pacific between Goble and Portland, the said Northern Pacific tracks being land-aided.

In the summer of 1904 the United States filed a bill in the Circuit Court of the United States for the district of Oregon to enjoin and restrain the Astoria Company from refusing to carry government freight and passengers at land-grant rates between Goble and Portland (131 Fed., 1006). The injunction was denied and the bill dismissed on the ground that the Astoria's partial use of the tracks of the Northern Pacific did not affect the duty or the power of the Northern Pacific to render to the United States all the transportation service which they might require, and that so long as this was so, it was a matter of no consequence to the government how many railroads used this particular track. The Government did not appeal from this decree, but in the settlement of accounts with the Astoria Company for transportation service between Portland and Astoria, it made land-grant deductions for that portion of the route which lay upon the land-aided tracks of the Northern Pacific Company. The Astoria Company brought suit in the Court of Claims for these deductions, making the same contention as here made in this case, that it was not a company whose railroad was

constructed by grant of land. The court below dismissed the petition upon grounds which, as is stated above, seem to indicate that it did not clearly understand the real contention, for it says (p. 301):

> "In other words, the contention is that while the Northern Pacific Company is subject to such regulations limiting charges for the transportation of troops and military supplies for the Government, it may, by leasing a portion of its railroad to another carrier over which to operate its trains for a period of ninety-nine years thereby exempt such lessee from the conditions imposed on the lessor by section 11 of the granting act."

It was not so contended in that case, and it is not so contended in this case. It is contended that where a company owning a land-aid road, the trackage facilities of which are greater than are needed by the owning company for the transaction of its business and the fulfillment of its obligations to the United States and the public, leases a partial use of a portion of its tracks to anther company, which partial use does not in any way interfere with the full use of them by the owning and aided company, the lessee does not fall within the terms of the 13th section of the act of 1876, which provides:

> "That railroad companies whose railroad was constructed * * * by grant of land * * * shall receive only eighty percentum of the compensation authorized by this act."

And it is further contended in this case, so far as the tracks between University Switch and St. Paul and the tracks between Lemars and Sioux City are concerned, that the railroad companies whose railroads have been constructed by grant of lands are the Great Northern and the Illinois Central; that they are the only companies in privity with the United States; that Congress has not the right to impose deductions upon any railroad company which has not been

aided in the construction of its own road, and that by the terms of section 13 of the act of 1876, Congress has not attempted to impose such terms upon any railroad company except those whose railroads have been constructed by grant of land—in other words, those which have received a benefit compensating for the deduction.

In the Astoria case the court below follows its erroneous statement of the appellant's contention with this conclusion (p. 302):

> "If this be true, then it follows that the Northern Pacific Company may rent different portions of its railroad * * * to as many different carriers (willing to connect with its lines), and thereby practically defeat the conditions imposed respecting the rates fixed for Government transportation."

We respectfully submit that this does not follow. The owning or aided company, as we have already said, has a contract with the United States by which it has bound itself to operate trains for the transportation of the Government business. And its railroad property, it may be conceded, is pledged to secure the performance of this obligation. Whenever one of these companies shall fail to perform its duty, whatever relief the United States may be entitled to must be sought by appropriate proceedings directed against the delinquent company. But again we respectfully submit that a discussion of that question had no place in the Astoria case and has no place in this case. In both cases the owning and aided companies are now and have always been ready to perform all the services due from them under the terms of their contracts with the United States. A reference to any railway guide will show that both the Great Northern and the Illinois Central operate as many passenger trains over the tracks in question as there are mail deliveries in the city of Washington.

Not only are the owning and aided companies in this case performing all the services which their contracts with the Government oblige them to perform, but since they have reserved to themselves all local business originating upon their respective tracks, it follows that they have been and will be compelled by the necessities of their own traffic to operate the same number of trains upon said tracks as if appellant had not been let into the use of them. This being true, the Government is receiving, and will receive, both in theory and practice, all the service from these owning and aided companies which it has the right to demand by virtue of its contracts with them.

If additional trains belonging to other companies are run over portions of the track of aided companies, they afford additional facilities for Government use of which the Government may avail itself if it elects to do so; but we are unable to see any shadow of reason why the Government already receiving all the service to which it is entitled by reason of any contract with any railroad company should have the additional service afforded by these additional trains belonging to other companies at any other rate of compensation than that fixed by Congress for the service of railroad companies owing no obligation to the United States.

We cannot possibly comprehend the theory of the court below expressed in the Astoria case (pp. 308-9), where it says:

> "Certainly, the demands of a wise public policy require that when the Government desires to ship troops or supplies by the claimant company (Astoria Company) from Fort Stevens or from Astoria to Portland by way of Goble, it shall have the right to do so at such rates over the land-aided portion of said road as the Congress may prescribe, without being compelled to reship or transfer such property at Goble to the Northern Pacific Company."

The Government, by its contract with the Northern Pacific Company, secured the right to have its mails, freight and passengers transported over the road belonging to the Northern Pacific, we will say, for convenience, between Portland and Takoma. At that time there was no railroad between the midway point of Goble and Astoria, and if the conclusion of the court above quoted shall be taken as the final definition of the rights and burdens created by the land-grant contract between the Government and the Northern Pacific, it will follow that the Northern Pacific has obliged itself to secure for the Government transportation facilities over roads not belonging to it and not constructed upon any land-grant right of way.

We think it will not be questioned by this court that so long as this appellant operated its trains only upon its own tracks between Lemars and St. Paul, the only right the United States had in the matter of mails was to have them carried between St. Paul and Lemars on the trains of appellant and there reshipped on the trains of the Great Northern or the Illinois Central, as the case might be. It has that right now, full and unimpaired. There has never been a moment since the appellant began the use of the tracks of the Great Northern and the Illinois Central that the Government could not have its mails carried on the same number of trains operated by the Great Northern and the Illinois Central, respectively, to St. Paul or Lemars and there reshipped on the trains of appellant.

The Postmaster-General has sole and exclusive authority to establish postal routes and fix their terminii, and over this question railroad companies have no authority or control. The Postmaster-General has designated the road of the Great Northern from St. Paul via University Switch and Minneapolis to Fargo as a postal route, and since the Act of 1876, has deducted from the Great Northern's compensation for

carrying the mail over this route 20 per cent of the amount fixed by law for the compensation of unaided companies for similar service. The establishment of this route provides fully for the transportation of all mails between St. Paul and Minneapolis. The Government has no right by contract or by statute to demand of any other company any service on these tracks. The service of this appellant between St. Paul and Minneapolis is a mere incident to its greater service between Minneapois and Sioux City. Certainly it is not demanded for the convenience of either St. Paul or Minneapolis, for they are already fully served by the Great Northern.

If the appellant had no trackage contract with the Great Northern, undoubtedly the Post Office Department would have designated St. Paul as the northern terminus of its postal route, and in that case appellant would have brought mails to St. Paul, where they would have been reshipped on trains of the Great Northern to Minneapolis. This is all the right the Government secured to itself by its grant of land in aid of the construction of the Great Northern tracks.

It is and always has been clearly within the election of the Postmaster-General to designate St. Paul as the northern terminus of appellant's postal route, regardless of whether or not appellant's passenger trains continue to Minneapolis. If he elects to have appellant carry Minneapolis mails through St. Paul to their destination at Minneapolis without reshipment at St. Paul, he must be presumed to do it because this plan secures greater accuracy and dispatch in the transportation of mails. If this be true, the Government is securing benefits which the Great Northern is not obliged to furnish under the terms of its land-grant contract, and which appellant is not obliged to furnish at any other rates than those fixed by law for the compensation of unaided companies because the service extends beyond any aided road which it may own. All this is equally true of appellant's use of the

tracks of the Illinois Central between Lemars and Sioux City. These tracks are primarily a part of the postal route between Dubuque and Sioux City on the Illinois Central.

It is clear, then, that the operation of appellant's trains over the leased tracks in this case have increased the Government's facilities for the transportation of mail at St. Paul and Lemars beyond anything it has the right to demand of either the Great Northern or the Illinois Central. The Government is at liberty to avail itself of these facilities, or leave them alone, as it may elect, but if it elects to use them it is difficult to understand any "demands of a wise public policy" which exempt it from paying the statutory compensation to the company furnishing the additional facilities.

In case of Union Pacific vs. Chicago, etc., Ry. Co. (163 U. S., 564) this court, speaking of the obligations of the Pacific Company, said:

> "What it agreed to do was to let the Rock Island enjoy such use of the bridge and track as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit, so far as that use was concerned, and in furtherance of the demands of a wise public policy."

It is here insisted that the "wise public policy" referred to in that opinion was that policy which was intended to foster and encourage the furnishing of greater facilities for railroad transportation. There is no intimation in that opinion that any "wise public policy" demands that these additional facilities should be furnished to the Government or to the public at any sort of reduced rate.

A question near akin to the question here presented arose in the Lake Superior and Mississippi Railroad Company case (93 U. S., 442). The question there was the construc-

tion of that section of the act granting land which provided that the railroad should remain a public highway for the use of the United States, free from tolls or other charges. It was contended by the Government that the company must do Government business without compensation; this court held that the Government was entitled to the free use of the road-bed only and must pay the company a fair compensation for transportation, this referred, of course, to freight and passenger transportation only, as a different section of the act covered the transportation of mails, but the attention of the court is called to this analysis of the relations of the Government to the railroad companies contained on p. 453 of this court's opinion in that case:

> "But suppose, in the case under consideration, the States of Kansas and Minnesota, to which the land grants were directly made, had themselves severally chosen to construct the railroads in question, to be operated and used by individuals or transportation corporations who might see fit to place rolling stock thereon upon payment of the proper tolls, would the Government have had any further right than that of using the road with its own carriages free of toll? It certainly could not have the right to use the carriages of third persons placed on the road; nor, from anything contained in the Act of Congress, could it require that the State should procure and place rolling stock on the road."

The rights of the Government and the several railway companies in this relation seem to be defined exactly and in full harmony with the previous decisions of this and all other courts of the United States, except the court below, in the opinion of Judge Bellinger in the case of the United States vs. Astoria Company above referred to (131 Fed., 1006), in which he says:

> "The defendant's use of the Northern Pacific Railroad track between Portland and Goble does not affect

> the transportation due from the latter company to the plaintiff. It is still open to the latter to have its freight carried over every part of the railroad of the land-grant company at fifty per cent of the regular rate. This is the extent of its right. And this right, as already appears, has not been affected by the use of that part of the company's track by the defendant company. It is a matter of no consequence to the plaintiff how many railroads use this particular track of the Northern Pacific Company, not what their tariff rates are, so long as the latter company continues to afford all the facilities for transportation over every part of its road required by the plaintiff."

In the entire opinion of the court below in the Astoria case which, of course, controlled it in this case, it would seem that the status of the appellant upon the tracks jointly used is misunderstood. Appellant is not in any sense the owner of the road, it has no other right than the license to use the road in such manner as will not interfere with all the use of it required for the traffic of the owning company. In these contracts between appellant and the owning companies, the owning company is a licensor and the appellant a licensee. If appellant is a mere licensee owing no contractual duty as a corporate individual to the Government, owning no railroad property which is pledged to the Government as security for the performance of any duty, and operating its trains on the joint track in such manner as to interfere in no wise with its licensor in the transaction of its business and the performance of its contractual duty to the Government, it is difficult to understand how appellant can be held to fall within the terms of the 13th section of the act of 1876, or why it does not stand upon the same footing as any other company without privity with the United States.

It is therefore respectfully submitted that the adjudgment of the court below should be reversed and the case remanded to that court with direction to render adjudgment in favor of

appellant and against the United States for the full amount found by that court to have been deducted from appellant's compensation upon the mileage represented by the contracts of the Great Northern and Illinois Central Companies.

SAMUEL A. PUTMAN,
Attorney for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

CHICAGO, ST. PAUL, MINNEAPOLIS AND Omaha Railway Company, Appellant,
v.
THE UNITED STATES. } No. 133.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Appellant company filed its amended petition in the Court of Claims July 31, 1907, alleging that the Postmaster-General had unlawfully deducted $40,000 from the amount due appellant for services in carrying the mails, and asked judgment for said amount so deducted. The court rendered and entered judgment against the United States in the sum of $3,389.53, from which judgment the company appeals to this court.

Appellant operates a line of railroad extending from Minneapolis, Minn., to Sioux City, Iowa, a

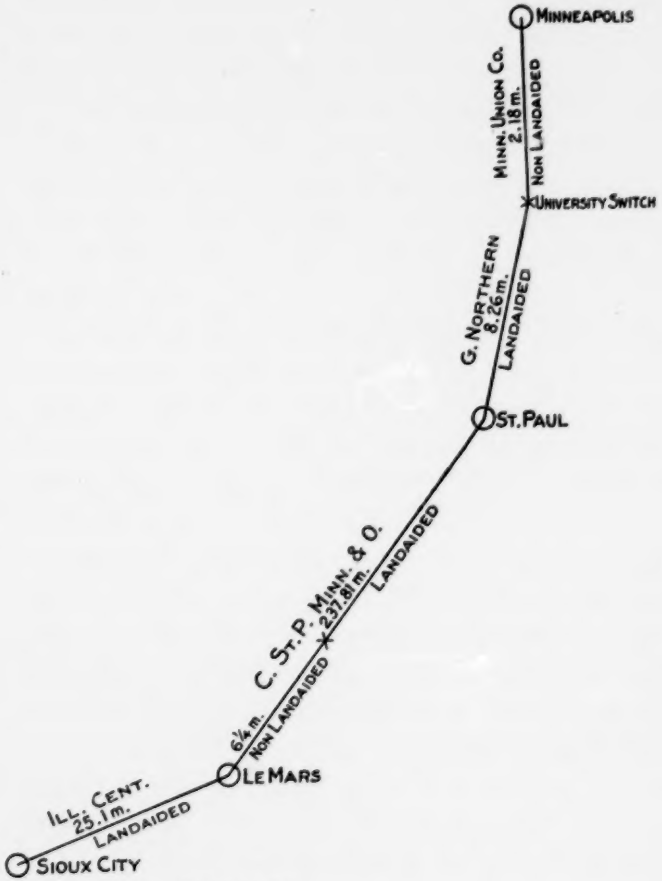
distance of 279.60 miles. It owns in fee a part of the track comprising said route. On the other portions it operates its trains over tracks belonging to other companies with which contracts for such privilege were in existence at the time of the transactions involved in this case. (Pet., par. 6; trans., p. 3; find. 2, 3, 4, trans., pp. 6, 9.)

The continuous line of railroads comprising said route were at a time prior to October 1, 1900, designated as a postal route by the Postmaster-General, since which time appellant has continued to carry the United States mails over the same. (Find. 6, trans., p. 10.)

In settling with appellant for said service the Postmaster-General deducted 20 per cent from the ordinary and usual compensation allowed railroads for carrying United States mail, on the ground that said railroad was a "land-grant road". (Find. 6, trans., p. 10.)

Appellant does not complain of the deduction relating to that portion of its own railroad which was built with the aid of a government land grant, to wit, that part lying between St. Paul, Minn., and a point 6¼ miles north of Le Mars, Iowa. It does, however, complain on account of the deduction aforesaid from the compensation accruing to the remaining portion of said route. (Pet., par. 7; trans., p. 4.)

The Court of Claims allowed appellant full compensation for carrying said mails as to that portion of the remainder of said continuous line of railroad which was built *without the aid of a government land*



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grant, and allowed the deductions aforesaid to stand for that portion not owned by the appellant but which was built *with the aid of a land grant*. (Find., 7, and conclusion of law; trans., pp. 10, 11.)

The diagram subjoined, while not drawn to any scale of measurement, shows the relative positions of the terminals and points on appellant's line of railroad with sufficient accuracy to illustrate the subject of contention in this case.

It will be observed that the portion of the road from Minneapolis to University Switch, 2.18 miles, belonging to the Minneapolis Union Railway Company, was built without the aid of a land grant from the United States. For carrying the mails over said portion of said road the court has allowed appellant payment in full, to which the Government concedes it was entitled. (*U. S.* v. *Ala. G. So. R. R. Co.*, 142 U. S., 615.)

From University Switch to St. Paul, a distance of 8.26 miles, the track belongs to the Great Northern Railway Company and was built with the aid of lands granted by the United States for such purpose. This is, therefore, one of the portions of said route about which there is contention as to the right of the Postmaster-General to make the deduction.

From St. Paul to a point 6¼ miles north of Le Mars, a distance of 237.81 miles, the track is owned by the appellant and was built with the aid of a land grant. About this portion of the route there is no contention, the appellant conceding that the deduction aforesaid was proper and lawful.

From a point 6¼ miles north of Le Mars to Le Mars the track is owned by appellant company, but was built without the aid of a land grant. For carrying the mails over said portion of said road the court has allowed appellant payment in full, to which the Government concedes it was entitled.

From Le Mars to Sioux City, Iowa, a distance of 25.1 miles, the track is owned by the Illinois Central Railroad Company, and was built with the aid of a government land grant. This is the other portion of said route about which there is contention as to the right of the Postmaster-General to make the deduction.

Appellant contends that, inasmuch as it had no part in the construction of said tracks belonging to the Great Northern Railway Company and the Illinois Central Railroad Company and did not receive any benefit on account of their construction by grant of land from the United States, as found by the court in finding 5 (trans., p. 10), it ought not to be compelled to suffer a deduction of 20 per cent of the full compensation for carrying the mail over said portions of said postal route.

The Government insists that by reason of the rights which it obtained or reserved to itself at the time the lands were granted it became legally entitled to prescribe the terms of compensation for carrying the United States mails over said railroad track, regardless of the relation existing between the owners of the track and the company carrying the mails thereover. In other words, we contend that the Post-

master-General had the right, because it was his duty to deduct the 20 per cent in question from the pro rata compensation of any person or company carrying the United States mails over the land-aided portion of said route, whether the carrier owned the road in fee simple or merely operated trains over it under some kind of lease or agreement with the owner.

THE STATUTES.

The land used in aid of the construction of the 8.26 miles of railroad track between University Switch and St. Paul was granted to the Territory of Minnesota by the act of March 3, 1857. (11 Stat. L., p. 195.)

By section 5 of said act it is provided:

> *And be it further enacted*, That the United States mail shall be transported over said roads and branches, under the direction of the Post-Office Department, at such price as Congress may by law direct: *Provided*, That until such price is fixed by law the Postmaster-General shall have the power to determine the same.

The land used in aid of the construction of the 25.1 miles from Le Mars to Sioux City, Iowa, was granted to the State of Iowa by the act approved May 15, 1856. (11 Stat. L., p. 9.)

The terms of the acts of the legislatures of Minnesota and Iowa, respectively, conferring the rights and benefits of said grants upon the company or companies which constructed said railroads, need not be examined, for it will be conceded, we believe, that

nothing which the legislature did or might have done could supersede or avoid any of the conditions of the grant by Congress.

The act of July 13, 1876 (19 Stat. L., 78), provides as follows:

> SEC. 13. That railroad companies, whose railroad was constructed in whole or in part by a grant of land made by Congress on the condition that the mails should be transported over that road at such price as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act.

ARGUMENT.

The first and, in fact, the only question for consideration in this case is whether or not the 8.26 miles of railroad from University Switch to St. Paul and the 26.1 miles from Le Mars to Sioux City was the "railroad" of the appellant within the meaning of section 13 above quoted.

The trains of the appellant carrying the mails over said portions of the postal route in question were operated under agreements with the respective owners of said roads which make the appellant the lessee of said owners, in one case for a period of twenty-five years and the other "during the corporate existence of the parties * * * and any extensions or renewals of their charters."

It seems to us that under these facts the railroads in question were the railroads of appellant within the meaning of its contract for carrying the mails over

said postal route, of which contract said section 13 is a part. That is to say, the continuous line of railroads comprising said postal route is the "railroad" of the appellant, to all intents and purposes, when it comes to applying the provisions of said section 13.

It is urged by appellant that, inasmuch as it did not construct the railroads in question or receive any benefit from the lands granted in aid thereof, there is no privity between it and the Government as relates to the privileges which the Congress reserved to the Government as consideration for such grant.

In answer to this contention, it seems only necessary to refer to the well-established principle that the lessee of a railroad can enjoy no greater right in the property than its lessor possesses, but uses the same subject to all the provisions and limitations of the lessor's charter and also to the same general provisions of law applicable to the lessor. (*McMillan* v. *Railroad Co.*, 16 Mich., 79, 102; *Pa. R. R. Co.* v. *Sly*, 65 Pa. State, 205; *Dryden* v. *Grand Trunk Ry.*, 60 Maine, 512.) This being true, it follows inevitably that since in the use of the road belonging to the Illinois Central, for instance, the appellant carries United States mails, it must do so on precisely the same terms and subject to the same conditions as if the said mails were carried by the Illinois Central itself.

Manifestly, when the Congress reserved the right to have the United States mails transported over the railroad constructed by the aid of said land grant "at such price as Congress may by law direct,"

it was intended to make this "right" definite, secure, and permanent. It was a part of the consideration for the grant. By the acceptance of the grant, this condition became "a covenant running with the land." Changing ownership or control of said "railroad" could not affect the right of the United States to have its mail "transported over said road" on the terms and under the conditions named. In other words, this condition or benefit reserved to the United States, as a condition of the grant, gave to the United States a "vested right" which could only be terminated by the action of Congress. There was the condition on which the United States mails were to be carried over these roads, standing as notice to all the world that whoever used them for that purpose, whether as owner, lessee, or licensee, must do so subject to this condition.

The Court of Claims said in the analogous case of the *Astoria and Columbia River R. R. Co.* v. *United States* (41 C. Cls., 284, 303):

> As the right to the use of the railroad by the Government for such transportation is reserved by Congress, it is manifest that the regulations restricting charges therefor must apply to any carrier transporting troops and supplies for the Government over said railroad. Otherwise the regulations would be inoperative.
>
> When the Northern Pacific Company leases a portion of its roadway, as in the present case, such lease, it must be held in the absence of any waiver by Congress, is taken

> subject to the conditions of the grant imposed upon the lessor. This would certainly not be controverted if the lease extended to the whole line of the land-aided railroad. In such case it would seem to require no argument or citation of authorities to show that the lessee would take not only subject to all the provisions and limitations of the granting act, but to the laws enacted thereunder applicable to the lessor as well; that is to say, in case the Northern Pacific Company should lease all of its right, title, and interest in and to said railroad, the granting act, with all its provisions and limitations, would as a matter of law be incorporated in such lease, and the lessee would be bound thereby, as was the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company. (See *Union Pacific Railroad Co.* v. *Mason City and Fort Dodge Railroad Co.*, 199 U. S., 160.)

The court then makes this pertinent observation:

> This being true, by whom and where shall the line be drawn exempting the lessee from the performance of government service at the rate prescribed for transportation over said railroad?

It is easy to see how the conditions of the two grants made in this case might be avoided, if the contention of the appellant is upheld, and it requires no particular violence to the imagination to assume that such an effort would be made if the remuneration were large enough. Suppose the Minneapolis Union Railroad

Company, which owns and operates its trains over the 2.18 miles from Minneapolis to University Switch, non land-aided track, should make an arrangement with the other railroad companies to enable it to run its trains from Minneapolis to Sioux City. In such case the Postmaster-General in establishing a route from Minneapolis to Sioux City would be compelled to deal with the Minneapolis Union Company, which, if the contention of appellant is sustained, would have the use of 271.08 miles of land-aided track out of a total of 279.60 miles free from the obligations resting upon the owners of said tracks. Or the effect would be to compel the Postmaster-General, in establishing routes for carrying the mails between the terminals mentioned, in order to realize on the benefits due the United States because of said land grants, to establish a route from Minneapolis to University Switch and another from St. Paul to Le Mars, leaving still other routes to be established between University Switch and St. Paul and Le Mars and Sioux City, or to make Le Mars the terminal of the route from St. Paul to said city. Such an arrangement and construction of routes would operate to the very great inconvenience of the Government and the public generally.

It is argued by counsel for appellant (Brief, p. 11) that it was within the election of the Postmaster-General to designate St. Paul as the northern terminus of appellant's postal route, regardless of whether or not appellant's passenger trains continue to Minneapolis. Obviously, this is true. It is likewise true that ap-

pellant was not obliged to carry the mail from Minneapolis to St. Paul. It was not compelled to enter into a contract with the United States to carry the mails over the route known as No. 141025, extending from Minneapolis to Sioux City. It could only be required to carry the mail over its own road. It is an open question whether it could be required to carry the mails over the non land-aided portion of its own road. (*Ala. Great Southern R. R.* v. *U. S.*, 25 C. Cls., 30, 41.) Whether it could or not is a matter of no consequence so far as the determination of the issue involved in this case is concerned. The fact that appellant did enter into a contract to carry the mails over the route designated excludes all questions of this kind. Appellant has no right to complain if the Government did get increased facilities between St. Paul and Minneapolis by reason of its agreement to carry the mails over route 141025. It entered into a contract with the United States to give it this additional facility for a consideration, knowing that in doing so it would be carrying the mail over land-aided track, on which the Government had a right to have the mails carried at a reduced price, and it must be held, therefore, that it was obligated to observe those conditions in the performance of its contract. This applies equally to the other end of the line; that is, the portion of the route in question from Le Mars to Sioux City.

For the reasons stated, the judgment of the Court of Claims should be affirmed.

NO PROTEST ON ACCOUNT OF DEDUCTIONS.

Another reason why the judgment should be affirmed, or the case remanded with instructions to dismiss the petition:

So far as this record discloses, there was no protest or objection made by the appellant to the deductions now complained of. It is stated in the petition that ever since the establishment of the postal route, now numbered 141025, the Postmaster-General has allowed and paid appellant only 80 per cent of the pay allowed by law to unaided companies for carrying mails (par. 6, trans., p. 3). There is nothing in the record to disclose that the appellant objected to this action or in any way whatever protested against the same or took any steps to assert its alleged right to the full compensation allowed unaided railroads for carrying the mails until the petition was filed in this case in the Court of Claims. Having continued to carry the mails for such a long period of time, covering at least five four-year contracts, appellant must be held to have accepted the compensation offered it in full for the performance of its services, and, therefore, estopped itself from recovering anything more up to the date of the filing of the petition in the Court of Claims. (*Eastern R. R. Co.* v. *U. S.*, 129 U. S., 391; *Chicago, M. & St. P. Ry. Co.* v. *U. S.*, 198 U. S., 385).

AMOUNT.

It will be observed that the Court of Claims has found the amount of deductions made by the Post-Office Department for two separate periods, one ex-

tending from October 1, 1900, to September 30, 1906, and the other from November 15, 1900, to September 30, 1906 (Finding VII, Rec., pp. 10, 11). Judgment was rendered on the first and third items in the first paragraph of said finding covering the first-mentioned period.

The reason for this finding is that in the trial of the case a query arose as to when the statute of limitations began to run against the alleged claim. It developed in the argument that settlements between the Post-Office Department and the appellant were made quarterly, beginning with the calendar year. It was urged that appellant could not begin its action for services performed between October 1 and November 15, 1900, until the end of the quarter in which the last-mentioned date occurred. The original petition having been filed November 15, 1906, it was held that right of action for services performed between October 1 and November 15, 1900, did not accrue until the end of the current quarter, which was January 31, 1900.

Respectfully submitted.

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PHILIP M. ASHFORD,
Attorney.

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CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 133. Argued March 9, 10, 1910.—Decided April 4, 1910.

The acts of May 15, 1856, c. 28, 11 Stat. 9; March 3, 1857, c. 99, 11 Stat. 195, and § 13 of the act of July 12, 1876, c. 179, 19 Stat. 78, providing that mails should be transported over railroads constructed in whole or in part by aid of land grants at eighty per cent of the authorized price, apply to such transportation by companies which carry the mail over a leased line which was partly constructed by such aid, although the transporting company itself received no land grant aid from the Government.

A court does not overlook contentions advanced which are necessarily untrue if the proposition upon which its decision rests is true. The statement of such proposition answers opposing contentions.

The reduction in mail service which the Government exacts in return for land grants for building railroads attaches to all tracks including those subsequently built, and to all companies operating thereover.

43 C. Cl. 595, affirmed; 41 C. Cl. 518, approved.

THE facts, which involve the amount of compensation due for transportation of mail by a railroad company over a railroad constructed in part by grant of land from the Government, are stated in the opinion.

Mr. Samuel A. Putman, with whom *Mr. Charles W. Bunn* was on the brief, for appellant.

Mr. John Q. Thompson, Assistant Attorney General, with whom *Mr. Philip M. Ashford* was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in this case is the legality of certain deductions made by the Postmaster General from the amount

which, it is contended, is due appellant for carrying the mails between Minneapolis, Minnesota, and Sioux City, Iowa, over postal route No. 121,045. The appellant sought to recover the sum of forty thousand dollars ($40,000). The Court of Claims gave judgment for only thirty-three hundred and eighty-nine dollars and fifty-three cents ($3,389.53), rejecting the balance of the claim on the authority of *Astoria & Columbia River Railway Company* v. *United States*, 41 Ct. Cl. 284.

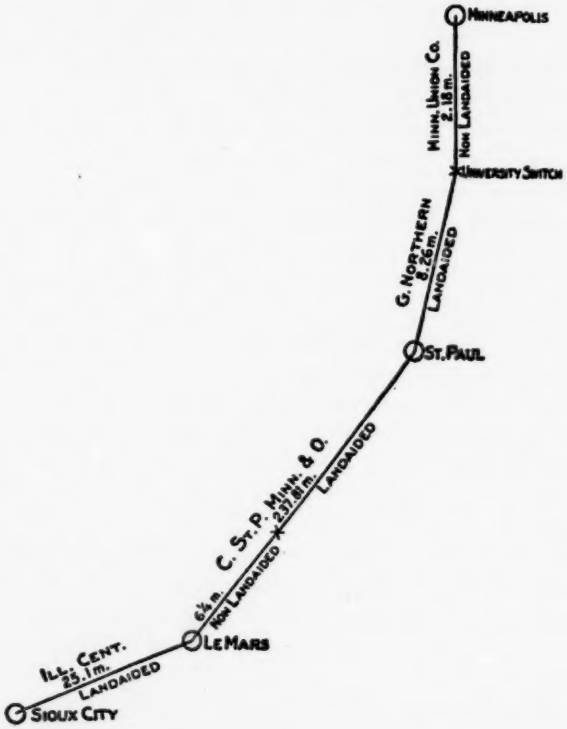
The controversy turns upon the application of certain acts of Congress, granting parts of the public domain to appellant and to companies with which it has agreements. The acts provide that the United States mails shall be transported on such roads at such rates as Congress may by law direct. Act of May 15, 1856, 11 Stat. 9, c. 28; Act of March 3, 1857, 11 Stat. 195, c. 99. Subsequently it was provided as follows:

"SEC. 13. That railroad companies, whose railroad was constructed in whole or in part by a grant of land made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act." Act of July 12, 1876, 19 Stat. 78, 82, c. 179.

The postal route begins at Minneapolis and consists of land-aided and non-land-aided roads. The following diagram, taken from the Government's brief, though not drawn to any scale of measurement, exhibits with enough accuracy for illustration the aided and non-aided parts of the route and the companies which received aid.

It will be observed that appellant is the direct beneficiary of the road from St. Paul south 237.81 miles to a point north from a place marked as Le Mars. It used the other parts of the route under the contracts with the other companies, and it is found that from some time prior to October 1, 1900, appellant used the tracks of such other companies to "form a continuous route for the operation of its mail trains, made up of its own rolling stock and controlled and operated by its

own servants, between Minneapolis and Sioux City, except that within the last-named city it did not use the station of the Illinois Central Company, but had a station of its own." It is also



found that appellant operated its trains over the tracks of the Great Northern Company under a contract in writing with the predecessor of the latter company, the St. Paul, Minneapolis and Manitoba Railway Company, and operated its trains over the Illinois Central Company under a contract with the predecessor of that company, the Iowa Falls and Sioux City Railroad Company. By the first contract appellant is given "the

right and privilege to run such of its locomotives, engines, car and trains, handled by its own employés, as shall be reasonably necessary for the efficient and full transaction of its business to and from the city of Minneapolis, and all points on the second party's road, east of St. Paul over the *main track* of the first party as now constructed." It was provided that the amount of the monthly rental should be a sum of money equal to one-twelfth part of the annual interest at the rate of six and one-half per cent per annum on one-half the value of the property of the first party, which the second party is entitled to use under the contract. And in addition such proportion of cost of maintaining and repairing the properties, "as the number of wheels per mile" appellant should "run over the said property or any part thereof, bears to the whole number of wheels per mile run over the same." It was provided that the earnings of all local business done by appellant over the railroad should belong to the party of the first part, but the appellant was not obliged to do such business. The contract was to continue twenty-five years.

The contract of the appellant with the Iowa Falls and Sioux City Railway Company may be said, as far as the question in the case is concerned, to be substantially the same. Its provision as to the use of tracks is more comprehensive. It permits also appellant to do local business, sixty per cent of the gross receipts of which, however, are to be paid to the Iowa Falls Company. There is a provision for maintenance and repairs, based on car mileage. The rental stipulated is $450 per mile for the use of each mile of main track.

It is found that appellant had no part in the construction of the tracks of the Great Northern Company or of the Illinois Central Company, and received no benefit on account of their construction by grants of land or otherwise; that ever since the construction of the tracks the respective companies owning them have operated trains and transported United States mails over them, and that the use of the tracks by those companies does not appear to have been limited by appellants

using them; that the tracks of the Great Northern Company between University Switch and St. Paul are a portion of postal route No. 141,004 between St. Paul and Fargo, North Dakota, and those belonging to the Illinois Central between Le Mars and Sioux City are a portion of postal route No. 143,021 between Dubuque and Sioux City, Iowa. That prior to October 1, 1900, the Postmaster General designated the line of railroad between Minneapolis and Sioux City as postal route No. 141,025, and has maintained it ever since, and that between that date and September 30, 1906, appellant has carried mails over such route, but the Postmaster General has allowed for the whole of the route only eighty per cent of the compensation allowed and fixed by law for similar service for non-land-granted roads. A table of reductions is given, showing the deductions for the periods mentioned, amounting in all to $33,301.17.

The contentions of the parties are foreshadowed by the facts which we have recited. It may be conceded, appellant says, that the grants of land to the companies to which they were made "completed contracts between them and the United States," and it may be further conceded, it is said, "that by these contracts privity was established between the United States and these various railroad companies." But succession to the obligation of the contract is denied because appellant "has not succeeded to the title or any part of the title of these respective roads, nor has it in any way directly or indirectly received any benefit from the respective grants or done any other thing which creates privity of contract between it and the United States or which makes it, in the language of the thirteenth section of the act of 1876, a railroad company 'whose railroad was constructed in whole or in part by a grant of land,'" etc.

This distinction is earnestly insisted on and is made the foundation of the argument of the appellant. It makes irrelevant, it is urged, the consideration of the obligations of the other companies, and by overlooking it the Court of

Claims fell into error in *Astoria & Columbia River Ry. Co.* v. *United States, supra,* and continued the error in its judgment in the case at bar. But did the Court of Claims overlook it? It was urged in *Astoria & Columbia River Ry. Co.* v. *United States,* as it is urged in this, to justify the distinction that the "owning and aided companies," to adopt counsel's designation, are and always have been "ready to perform all the service due them under the terms of their contract with the United States," and it seems to us that the Court of Claims did not misunderstand or overlook the contention. A court does not overlook a contention because it rests its decision upon a proposition which, if true, the contention is not true. To bring forward a proposition upon which the question to be proved depends answers necessarily opposing propositions. And this is what the Court of Claims did. It decided that the power reserved to Congress was over the property, not alone over the companies who owned it and extended to every use of it, whether by the owning companies or any company who received a right from them. That proposition, if true, necessarily determined the judgment against the Astoria and Columbia River Railway Company in the cited case. It is opposed to the proposition decided in that case by the Circuit Court of the United States for the District of Oregon, and which is relied upon by appellant in this case. That case was brought by the United States to enjoin the Astoria and Columbia River Railway Company from charging for the transportation of army supplies from Portland, carried by that company over the tracks of the Northern Pacific Railroad Company, which it used under a contract with the latter company. The suit was based on the fact that the Northern Pacific was a land-aided road. The injunction was refused. The court sustained the contention which was made (and which was repeated in the Court of Claims and is repeated here), that the power reserved to Congress attached in effect to the company, not to the property. The Circuit Court said: "The defendant's use of the Northern Pacific Railroad track

between Portland and Goble does not affect the transportation due from the latter company to the plaintiff. It is still open to the latter to have its freight carried over every part of the railroad of the land grant company at fifty per cent of the regular rate. This is the extent of its right. And this right, as already appears, has not been affected by the use of a part of that company's track by the defendant company. It is a matter of no consequence to the plaintiff [United States] how many railroads use this particular track of the Northern Pacific Company, nor what their traffic rates are, so long as the latter company continues to afford all the facilities for transportation over every part of its road required by the plaintiff." *United States* v. *Astoria & C. R. R. Co.*, 131 Fed. Rep. 1006.

The order denying application for injunction was pleaded in the Court of Claims, as it appears from the opinion of the court, as *res judicata* of the "subject-matter" there involved, and therefore the full breadth of the contentions of the railroad company in the Circuit Court and of the decision of that court was considered by the Court of Claims, and all of the elements of decision and all the distinctions which depended upon them the court must have taken into account in rendering its decision.

We are brought then to the question whether the decision of the court was right. Certain concessions are made by appellant at the outset of the argument. It is conceded that the acceptance of the land grants by the "owned and aided companies" completed a contract between them and the United States, and that privity was established between them and the United States. That is privity (we use the word, as we presume that counsel does, in the sense of party for the United States, and the companies are parties, not successors, to rights or obligations) of contract, a personal obligation, that is, not an obligation which attached to the property and covered every use of it. This is necessarily what appellant means, though it is confused in discussion.

Appellant quotes the statute to show that the obligation is on the *companies*, not on the *roads*, as follows: "That railroad companies whose railroad was constructed . . . by grant of land . . . shall receive only eighty per centum of the compensation authorized by this act."

And further, it points out, as we have seen, that it has not succeeded "to the title or any part of the title" of the roads, nor "directly or indirectly receives any benefit from the respective grants." And, finally, it urges that if appellant "is a mere licensee, owing no contractual duty as a corporate individual to the Government, owning no railroad property which is pledged to the Government as security for the performance of any duty, and operating its trains on the joint track in such manner as to interfere in no wise with its licensor in the transaction of its business and the performance of its contractual duty to the Government, it is difficult to understand how appellant can be held to fall within the terms of the thirteenth section of the act of 1876, or why it does not stand upon the same footing as any other company without privity with the United States."

This is stating by periphrase the simple proposition that there is a contract only between the United States and each of the aided companies, in which such company "has bound itself" [we quote from appellant's brief] "to operate trains for the transportation of the Government business." And "whenever" appellant says "one of these companies shall fail to perform its duty, whatever relief the United States may be entitled to must be sought by appropriate proceedings directed against the delinquent company." Appellant joins to this as a concession that the "railroad property" of an aided company "is pledged to secure the performance" of its obligation. In what way is not pointed out, or how the security can be availed of.

The opposite contention to that of appellant is, therefore, what it was decided to be by the Court of Claims, that the obligation is upon the property of an aided company, and

attaches to all of the uses of the property, whether by the "owned and aided companies" or any other company. We concur with the decision of the Court of Claims, and we think further discussion is not necessary, except to notice some of the reasons urged against the decision.

We have noticed and commented on one concession of appellant. Another is made, which we quote with its qualifications, as follows: "We do not contend that a land-aided road can be sold, either in whole or in part, so as to avoid its obligations to the government. To this extent we concede that the obligation runs with the railroad aided by land grant, but the act does not say that companies permitted simply to run trains on the road shall suffer reductions. They receive no aid from the grant, and are neither within the terms or the reason of the statute." Of course, the statute did not deal with other companies or with deductions. It would be very strange if it had. It either imposed a service on the companies or on the road as well. If on the companies alone, there would necessarily be exclusion of all others. If on the roads as well, it would comprehend all that used them. If a difference in degree of use or a participation in the use by other companies than the aided ones, had been intended it would have been expressed. The concession as to the effect of the sale or lease of the road is fatal. As we have already said, the obligation is either upon the aided companies, to be enforced by remedies against them, or it is on the property as well, and if on the property, necessarily on it by whatever company or person it is used.

It is further contended in the brief filed for the Great Northern that the condition of earning its grant was the building of a single track and it or its grantors, it is said, has provided several. It has therefore, it is further said, "a surplus of track capacity and, by contract, permits the Omaha [appellant] and other companies to run their trains over its tracks." To this it is only necessary to reply that the service that the Government reserved was coextensive with

the road as constituted under the grant and attached to as many tracks as should be used.

Again, it is urged that if the Omaha Company had built its own road there would be no assertion of a right to deduct from its mail pay, and that it is to run over the Great Northern, the latter not being made thereby less useful or efficient, is for its purpose equivalent to building its own road. An answer to this is contained in what we have said. We may add, however, that the appellant no doubt considered the advantages and disadvantages of the alternative presented before making its selection, but it could not have supposed, nor can we admit, that it could lessen rights in property because it could acquire like property for itself.

Union Pacific v. *Chicago &c. Ry. Co.*, 163 U. S. 564, and *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442, are cited as authorities against our conclusion. We content ourselves by saying that they have not that effect. On *United States* v. *Astoria Company*, 131 Fed. Rep. 1006, we have commented.

Judgment affirmed.